erroneously abbreviated. Compare MMB PFCL ¶¶106-08, 113-15, 118-20, and 123-24 with ¶¶108-21 above. All the facts should be considered. For example, to identify Pastor Hill as a member of the TBN family without any indication of his leadership role in the minority community (MMB PFCL ¶¶117, 273) gives a materially incomplete account of who he is. It also is inaccurate to say he had little impact on the company because NMTV made no effort to loosen its ties to TBN (Id. ¶273), when in fact Pastor Hill initiated NMTV's action to adopt a formal plan to repay its debt to TBN. (TBF PFCL ¶142; ¶118 above.) It also is unwarranted to fault NMTV's failure to purchase additional stations during his Directorship (MMB PFCL ¶273), since he joined the Board when the proposed Wilmington acquisition had just expired. NMTV soon thereafter filed its Request For Declaratory Ruling and has been opposed by Glendale and SALAD ever since.

252. The Bureau's suggestion that NMTV was required to be motivated by "return on investment" (MMB PFCL ¶281) incorrectly imposes a commercial value system on a nonprofit entity. Also, the Bureau creates a Catch-22 when it suggests (MMB PFCL ¶119) that NMTV's forgiveness of the Prime Time debt should have been tied to TBN's forgiveness of NMTV's debt. If TBN had forgiven NMTV's debt as part of that process, TBN would now surely be charged with having used its position as creditor to control NMTV's decision. Whatever the motives of NMTV's Directors -- in this case spiritual, charitable, and spreading the gospel -- it

was those Directors, and no one else, who made the decision to forgive the Prime Time debt. (See ¶¶76-79 above.)

253. The Bureau's conclusions regarding NMTV's use of TBN personnel, consultants, and lawyers (MMB PFCL ¶¶284, 287) do not consider the underlying history of the Commission's policy, which specifically encourages established broadcasters to provide such management and technical expertise. (TBF PFCL ¶¶590-600.) The conclusions also do not reach the central question of who made NMTV's decisions. Further, the fact that one religious organization provides such services to another without compensation (MMB PFCL ¶284, 286-87) may not constitutionally be considered. (TBF PFCL ¶¶676-77.) Likewise, the First Amendment and statutory restrictions foreclose the Bureau's proposed conclusions regarding the kind of programming NMTV broadcast. (Id. ¶¶678-79; ¶192 and n. 29 above.) And, the Bureau's conclusion that Jane Duff could not possibly have carried out her responsibilities to NMTV and TBN as a principal of one and a salaried employee of the other (MMB PFCL ¶285) conflicts with: (a) numerous precedents in which precisely such arrangements were approved (TBF PFCL ¶640; ¶82 above); (b) the Commission's "key personnel" policy, which permits such interests in this situation (Id.); and (c) the joint venture concept by which licensees share management and technical expertise under the minority ownership policy.

254. The following are some of the other errors in the Bureau's PFCL:

(a) The citations set forth in MMB PFCL ¶20 do not support the statement that "Crouch made himself" President of TTI. TBF PFCL ¶19 is a more complete and accurate statement of the record.

(b) MMB PFCL ¶43 erroneously states that TTI had no annual meeting in 1982. Such a meeting was held. (MMB Ex. 47.)

(c) The statement in MMB PFCL ¶48 that TBN has "continually represented that CET's stations are owned and operated by TBN" is inaccurate. First, not all of the cited newsletters refer to CET's stations as TBN owned and operated. Moreover, the cited newsletters end with MMB Ex. 184, a newsletter dated March 1988. Thereafter, the newsletters identified CET as a separate licensee and/or its stations as separate affiliates of TBN. (MMB Ex. 192, p. 3; MMB Ex. 219, p. 6; MMB Ex. 225, p. 6; MMB Ex. 250, p. 4; MMB 274, p. 1; MMB Ex. 291, pp. 3, 5; MMB Ex. 299, pp. 1-2; MMB Ex. 302, p. 3; MMB Ex. 341, pp. 3, 6; MMB Ex. 349, p. 5; MMB Ex. 372, p. 5.)

(d) The statement in MMB PFCL ¶49 that Dr. Crouch viewed TTI as a vehicle for obtaining new construction permits by taking advantage of "the minority and diversity preferences" is not entirely accurate. On the pages cited, and elsewhere, Dr. Crouch did acknowledge that TTI was envisioned as a corpora-

tion that would apply to take advantage of the minority preference. (Tr. 2587; TBF PFCL ¶12 and n. 8.) However, he did not state that its purpose also was to take advantage of the diversity preference. That part of the proposed findings is incorrect and may not properly be adopted.

(e) The last sentence of MMB PFCL ¶56, which asserts that Mr. May testified that he did not bill TTI for services performed leading up to the signing of the Odessa agreement, is not supported by the designated citation (Tr. 3300) or by the record. To the contrary, Mr. May testified that he did recall billing TTI for services rendered leading up to the Odessa agreement. (Tr. 3436-37.)

(f) At MMB PFCL ¶61, the Bureau speculates that "it is probable" that Pastor Espinoza learned from Mrs. Duff that TTI was going to seek to acquire a construction permit for a full power station at the time he and Mrs. Duff discussed changing the corporation's name. However, the Initial Decision should not rely on conjecture. As discussed at ¶229 above, the testimony of Pastor Espinoza and Mrs. Duff is consistent that Pastor Espinoza was consulted about acquiring the Odessa permit before any decision was made, rather than after the fact. (TBF PFCL ¶¶29, 100, 102, 255.) The conjecture to the contrary is therefore erroneous. MMB PFCL ¶¶58 and 60 similarly fail to address the testimonial evidence surrounding the Odessa purchase, which establishes that Pastor Espinoza approved both that

purchase and the appointment of TBN as NMTV's accounting agent when those actions were taken. (Id.)

(g) MMB PFCL ¶62 concludes by citing a portion of Dr. Crouch's testimony (Tr. 2667-74) that he later clarified upon further cross-examination. (TBF PFCL ¶262.) The additional testimony, which is cited in part at MMB PFCL ¶81, should be considered together with his earlier testimony, not in the sequence the Bureau has suggested.

(h) MMB PFCL ¶70 fails to mention that the list of stations referenced in the cited newsletter specifically designated KMLM(TV) as a "National Minority TV, Inc." station. (MMB Ex. 225, p. 6.) Additionally, the Bureau fails to note that subsequent TBN newsletters published prior to the Wilmington petition to deny identified NMTV as a separate licensee and/or the Odessa and Portland stations as separate affiliates of TBN. (MMB Ex. 225, p. 6; MMB Ex. 250, p. 4; MMB Ex. 291, p. 3; MMB Ex. 299, p. 2; MMB Ex. 302, p. 3; MMB Ex. 341, p. 6; MMB Ex. 349, p. 5.) In any event, these listings say nothing about the central issue of who made the decisions concerning NMTV's operations.

(i) The discussion in MMB PFCL ¶79 regarding NMTV's decision to acquire the Portland station omits two key facts. First, in noting that NMTV was in debt at the time of the proposed purchase, the Bureau omits the critical fact that NMTV viewed the Portland purchase as the way to become financially

viable and satisfy its debts. (TBF PFCL ¶72.) Mrs. Duff said it aptly:

> "We had debts that we needed to pay and the only way we'd be able to pay this, if we had a station that would produce revenues. And to me, this, this was very important, this was critical." (Id.; Tr. 1779.)

This essential element of the Portland acquisition should not be disregarded. Second, the Bureau's presentation makes no reference to the evidence of Pastor Espinoza's involvement in the decisions regarding the Portland purchase. That evidence, which is accurately set forth at TBF PFCL ¶¶107-109, should be considered.

(j) MMB PFCL ¶88 fails to mention that Pastor Espinoza was consulted by Mrs. Duff concerning James McClellan's application for the position of Station Manager at Portland, which Pastor Espinoza supported. (TBF PFCL ¶113.) That evidence should be considered. The Bureau's presentation also fails to address other important evidence that it elicited regarding Mr. McClellan's supervision of Mr. Fountain in conjunction with obtaining engineering assistance from Mr. Miller. (¶172 above.) Additionally, the Bureau's proposed findings make no reference to the other evidence regarding Mrs. Duff's substantial responsibility for hiring and supervising personnel at both the Odessa and Portland stations. (TBF PFCL ¶¶63, 79, 80, 189, 192, 193.)

(k) The statement in MMB PFCL ¶95 that Mrs. Duff's role as Assistant to the President of TBN was "first revealed"

to the Commission in a filing made on May 23, 1991, does not address the fact that TBN's 1988 application for license renewal and related employment reports for KTBN-TV identified Mrs. Duff as the "Administrative Assistant to the President." (TBF PFCL ¶66; TBF Ex. 122, p. 160.) That information was filed with the Commission on July 29, 1988, nearly three years before the Wilmington petition to deny. (TBF Ex. 122, p. 153.)

(l) As discussed at ¶155 above, the proposed finding in MMB PFCL ¶96 that Norman Juggert prepared the Wilmington promissory note is erroneous. (Tr. 3955.) Such a finding should not be made.

(m) The statement in MMB PFCL ¶106 that Dr. Crouch's position concerning Odessa "eventually prevailed" is superficial. It omits substantial evidence regarding the events that occurred during the two-year period between June 1987 and May 1989. (See ¶¶55-56 above.) For example, Dr. Crouch wanted to sell the permit without building the station, but the permit was not sold and the station was built. Thus, Dr. Crouch's wish did not prevail. Moreover, the statement suggests that Pastor Espinoza continued to disagree with Dr. Crouch at the time NMTV's Board decided to sell Odessa, when in fact the decision to sell was made only after the facts had proved Dr. Crouch right and both Pastor Espinoza and Mrs. Duff agreed with his position. The complete evidence regarding the decisions to

construct, operate, and sell the Odessa permit should be considered. (See TBF PFCL ¶¶40-46, 75, 77-78, 111.)

(n) The initial portion of MMB PFCL ¶108 is incomplete because it does not address the numerous matters in which Pastor Espinoza was involved and about which he did know. (¶¶108-09 above.) The last sentence of ¶108 disregards Pastor Espinoza's testimony about his hopes that NMTV, as a minority-owned company, would be able to provide Spanish-language programming which TBN had discontinued. (TBF PFCL ¶¶88, 90, 103, 112.) Moreover, Pastor Espinoza's situation must be viewed from the perspective that it was eight years from when he became a Director in September 1980 until NMTV's first station went on the air in October 1988. While the record reflects that he showed genuine enthusiasm and participation in the events during the bulk of his term on the NMTV Board (¶¶108-09 above), the passage of time before NMTV became operational resulted in those operations coinciding with the advancing age and ill health of Pastor Espinoza's father and his own increasing responsibilities at his Church. (TBF PFCL ¶116.) As a result, he was unable to be involved to the extent that he admits he should have been. (Id.) This does not prove that Pastor Espinoza, NMTV, or TBN proceeded in bad faith, but that in life events sometimes interfere with the best intended plans. That in fact is what happened regarding Pastor Espinoza's involvement with NMTV.

(o) MMB PFCL ¶¶114-15 regarding Pastor Aguilar's involvement with NMTV are incomplete. First, they fail to address the full extent to which Pastor Aguilar had knowledge of and participated in NMTV's affairs. (¶¶110-15 above.) Second, the reference to his attending only 50% of the NMTV Board meetings refers only to formal meetings at which minutes were kept, while excluding other informal telephone conferences and discussions in which he participated with the other Directors. Regarding the last sentence of MMB PFCL ¶115, while Pastor Aguilar did not "visit the station" to review its operations, he did go to Portland and ascertained how the station's performance was being perceived in the community. (TBF PFCL ¶¶130, 145.)

(p) MMB PFCL ¶116 inaccurately states that Pastor Hill received a packet of information either immediately prior "or shortly after" his election to NMTV's Board. (MMB PFCL ¶116.) The record clearly shows that he received the packet before deciding to join the Board and that the process to include him on the Board occurred weeks earlier than his election. (¶69 above.)

(q) MMB PFCL ¶124 erroneously states that the main item on the agenda during the second NMTV Board meeting that Armando Ramirez attended was a possible conflict of interest. Dr. Ramirez clarified that the discussion of a possible conflict of interest occurred at the first Board meeting (MMB Ex. 412),

and that the issue of waiving the attorney-client privilege was the sole item discussed at the second meeting. (Tr. 4104-05.)

(r) MMB PFCL ¶134 overlooks the fact that the record contains more recent financial information concerning NMTV. (MMB Ex. 413.) That exhibit shows that by the end of 1992 NMTV had earned annual revenues of $2.9 million and annual profits of $760,000, and had net assets or fund balances of $2.5 million. (Id., p. 1.)

(s) Concerning MMB PFCL ¶¶28 and 292, there is no evidence that Jane Duff, Norman Juggert, Phillip Aguilar, E.V. Hill, or Armando Ramirez ever saw the reference to TTI as a satellite division, or that anyone interpreted that expression in terms of a legal corporate relationship rather than a program affiliation. (TBF PFCL ¶98.) Furthermore, the use of the expression in newsletters does not address the issue under Section 310 of who made NMTV's decisions after it obtained construction permits and licenses.

255. In essence, the Bureau's conclusions on the de facto control issue reflect more of a visceral feeling that TBN must control NMTV than actual evidence that TBN does control NMTV. However, such suppositions cannot substitute for the actual evidence of who made NMTV's decisions that is required. In view of their omissions and inaccuracies, the Bureau's conclusions should not be adopted.

III. GLENDALE QUALIFICATIONS ISSUES

A. Raystay's LPTV Extension Applications

256. Glendale's contorted effort to evade the facts does not change the record and cannot save Glendale from disqualification for Raystay's patent misrepresentations and lack of candor in LPTV extension applications and George Gardner's role therein.

1. Exhibit 1 Did Not State the Reason for No Construction

257. Contrary to Glendale's contention, Exhibit 1 of the extension applications did not disclose why Raystay had failed to construct the LPTV stations. Glendale acknowledges that "[t]he only reason construction had not been completed was that Raystay had not developed a viable business plan." (Glendale PFCL I ¶¶398; see also ¶657.) Glendale argues that George Gardner thought the fourth paragraph of Exhibit 1 laid out the business plan and was telling the Commission that no construction had commenced because Raystay had not developed a viable business plan. (Id. ¶399.) That explanation collapses under scrutiny.

258. The fourth paragraph of Exhibit 1 says nothing whatsoever about a business plan. Even more to the point, it does not disclose that Raystay had long since concluded that the business plan was not viable. The paragraph reads in its entirety as follows (TBF Ex. 245, pp. 3-4):

> "Raystay has undertaken research in an effort to determine the programming that would be offered on the station. It has had discussions with program suppliers to determine what programs could be available for broadcast on the station. It has also had continuing negotiations with local cable television franchises to ascertain what type of programming would enable the station to be carried on local cable systems."

At most, this paragraph suggested that Raystay was exploring programming and was working to arrange cable carriage -- normal pre-construction activity for any television permittee. Exhibit 1 gave no hint that Raystay (a) considered cable carriage essential to economic viability, and (b) had no intention of constructing the LPTV stations without cable carriage because "there was no way that I [George Gardner] was going to go ahead" without a viable business plan. (Tr. 5270; see also TBF Ex. 211, p.1 and Tr. 5213-14.)

259. In short, the reference in Exhibit 1 to cable negotiations served Raystay's purpose nicely by purporting to demonstrate diligent ongoing pre-construction activity that might induce the Commission to grant an extension. But it concealed the crucial and decisionally significant fact that Raystay (George Gardner) had resolved not to start construction because there was no cable carriage. In no way could the Commission have guessed from Exhibit 1 that Raystay had made that business decision. Hence, it is preposterous for George Gardner to claim that Exhibit 1 was stating the reason why construction had not begun. That claim (like much of Glendale's

testimony) appears contrived for purposes of the hearing and is not credible.

2. The Statements in Exhibit 1

a. "Lease Negotiations" with Site Owners

260. Glendale takes several unconvincing tacks in trying to defend the grossly deceptive statement in Exhibit 1 that "[Raystay] has entered into lease negotiations with representatives of" the transmitter site owners (TBF Ex. 245, p. 3).

261. First, Glendale questions the memory of Barry March and Edward Rick, the disinterested site owners who testified that no such negotiations had occurred. According to Glendale, March "admitted he may have had a short telephone conversation which he forgot about." (Glendale PFCL I ¶648; see also ¶372.) That vastly overstates what March said. March was asked by Glendale's counsel what he meant when he said there had been no such conversation to the "best of my knowledge and belief." In response, March merely acknowledged hypothetically that the "potential would exist" that he had such a conversation, but he was firm in reiterating that "I don't recall it." (TBF/Glendale Jt. Ex. 5, p. 66.) By far the greater weight of March's testimony is that no such conversation occurred. That is especially true since March typically did not arrive at his office in the morning until more than an hour after the 9:08 a.m. one-minute call that David Gardner says constituted his

"lease negotiation" conversation with the Lebanon Quality Inn (a telling point Glendale does not address). (TBF Ex. 228; TBF/Glendale Jt. Ex. 5, p. 97.)

262. Even less convincing is Glendale's effort to dismiss Rick with the conclusory assertion that, "It is, of course, equally probable that Mr. Rick forgot about a similar conversation." (Glendale PFCL I ¶648.) That supposition is completely unsupported by any evidence in the record. Indeed, it is flatly refuted by the fact that Rick was thoroughly surprised by the visit he received from Trinity's engineer (Tom Riley) on October 16, 1991, just six days after the "lease negotiation" conversation that David Gardner says occurred when he called Ready-Mixed to arrange the engineer's visit. (TBF PFCL ¶324.) If that conversation had taken place as Gardner claims, Rick would not have been surprised when Riley showed up six days later.

263. To buttress the "lease negotiations" claim, Glendale asserts that David Gardner told Lee Sandifer in the fall of 1991 that he was "having discussions" with representatives of the Lancaster and Lebanon site owners. (Glendale PFCL I ¶375.) However, David Gardner's own testimony on this point does not support the implication conveyed by that phrase. Gardner recalled telling Sandifer only "that I had made contact with the representatives of the owners of the sites and that the sites seemed available." (Tr. 4734.) There was no suggestion of any ongoing "discussions." Moreover, as Sandifer's testimony makes

clear, Gardner had mentioned this to him merely in the context that Gardner was arranging for Trinity's engineer to visit the sites. (Tr. 5155.) Sandifer knew full well that the purpose of that visit had to do with Raystay's selling the permits to Trinity, not building the stations itself.

264. Obviously embarrassed by the documentary evidence proving that the telephone calls in question did not exceed 60 seconds (TBF. Ex. 228), Glendale cites "David Gardner's independent recollection that the calls were each four or five minutes long." (Glendale PFCL I ¶651.) That self-serving "recollection" is not credible. Since each call was in fact no more than 60 seconds (including waiting time and preliminaries), there could not possibly have been enough substantive conversation to give Gardner the impression that each call lasted four to five times longer than it actually did. If that truly was his recollection, then it only shows how unreliable is anything he professes to recall about the events at issue in this case.

265. Citing David Gardner's absurd claim that he considered the term "negotiations" to mean the same as "discussions," Glendale contends that Exhibit 1 would have been accurate if it had said:

> "[Raystay] has entered into discussions with representatives of the owners of the antenna site specified in the applications, although these discussions have not been consummated." (Glendale PFCL I ¶649, emphasis added.)

That argument is untenable. First, "lease negotiations" plainly does not mean the same thing as "discussions." All dialogues (including idle chatter) are discussions. Only certain dialogues are negotiations, and only certain negotiations are lease negotiations. As Raystay's Contract Manager (Tr. 4542) with extensive experience negotiating contracts since 1973 (Tr. 4544-45), David Gardner clearly knows the connotation of the term "lease negotiations." His convenient redefinition of that term to fit the facts of this case is patently disingenuous. Cf., 62 Broadcasting, Inc., 3 FCC Rcd 4429, 4449 (¶117) (ALJ 1988).

266. Moreover, contrary to Glendale's contention, Exhibit 1 would have been misleading even if "discussions" had been substituted for "negotiations." The term "discussions" implies an exchange longer than one minute, especially when coupled with words like "lease" and "consummated," which strongly suggest a purposeful and focused substantive exchange. Moreover, in saying that discussions had been "entered into" but had "not yet been consummated," Exhibit 1 still would have falsely implied that the discussion process was ongoing when Raystay filed Exhibit 1 in December 1991 and again in July 1992. Discussions were not ongoing. Indeed, David Gardner did not even ask to whom he was speaking in the two 60-second calls (Tr. 4703). So when he hung up after 60 seconds he clearly did not contemplate having further "discussions" with his interlocutor about a lease arrangement, and of course none ever occurred.

267. In a futile effort to distance George Gardner from the misconduct, Glendale contends that he "had [no] reason whatsoever to know that the statement was false." (Glendale PFCL I ¶653.) To the contrary, George Gardner had every reason to know there was no truth to the claim that Raystay had "entered into lease negotiations" with the LPTV site owners. He knew that Raystay had no viable LPTV business plan and no intention of proceeding without one. He also knew that Raystay was looking to sell the permits. Under those circumstances, it would have been immediately obvious to him in reading Exhibit 1 that Raystay had no reason to be negotiating site leases it did not need for stations it did not intend to build. In short, the "lease negotiation" claim was utterly inconsistent with the facts known to George Gardner. Moreover, if Raystay actually had entered into lease negotiations for the LPTV transmitter sites, that important development would certainly have come up at George Gardner's monthly staff meetings with Sandifer and Harold Etsell, at which (according to Gardner) the status of the LPTV project was regularly discussed. (Tr. 5326, 5330-31.) Since George Gardner had heard nothing at all about lease negotiations in those discussions, he must have known that the statement in Exhibit 1 was untrue. Had he been proceeding in good faith, he surely would have found the statement at least puzzling and asked someone about it. The fact that he did not (Tr. 5256) reflects that he knew the truth and willingly endorsed Raystay's misrepresentation.

268. Glendale misplaces its reliance on Broadcast Associates of Colorado, 104 FCC 2d 16 (1986), where the Commission declined to disqualify an applicant for false testimony. (Glendale PFCL I ¶652.) The testimony at issue there was the result of "a spontaneous misjudgment made under the trying circumstances of the deposition session rather than a calculated attempt to deceive," id. at 19 (citation omitted), and the applicant had later voluntarily disclosed the that her testimony had been inaccurate. Id. at 17-18. Here, there was nothing spontaneous about Raystay's false "lease negotiations" claim, and it was not made under trying circumstances. It was carefully reviewed and approved by both David Gardner and George Gardner, who had ample opportunity to give it their full consideration and make any changes they wanted before submitting it to the Commission. (Tr. 4684-85, 5245-47.) Under those circumstances, the "lease negotiations" claim (like all the other representations in Exhibit 1) could hardly have been more deliberate.

b. Site Visit by "an Engineer"

269. Equally untenable is Glendale's effort to rationalize the statement in Exhibit 1 that:

> "A representative of Raystay and an engineer have visited the antenna site and ascertained what site preparation work and modifications need to be done at the site." (TBF Ex. 245, p. 3.)

As Glendale has been forced to concede, the "engineer" (Tom Riley) was not associated with Raystay, and his site visit had

nothing to do with any construction effort on Raystay's part, as Exhibit 1 plainly implied. He was the engineer for a prospective buyer (Trinity), who inspected the sites solely to advise his client on the potential purchase.

270. Glendale defends that statement with the specious observation that, "While the Exhibit 1 said that the representative was affiliated with Raystay, no such claim was made for the engineer." (Glendale PFCL I p. 375, n. 27, emphasis added.) The Commission could be forgiven if somehow it missed that subtlety at the time. Indeed, George Gardner missed it himself. He understood that the "engineer" in question was Raystay's engineer. (Tr. 5261, 5340-41.) In the context of an exhibit purporting to recite pre-construction steps taken by Raystay, the phrase "[a] representative of Raystay and an engineer have visited . . ." is plainly intended to claim that the engineer was affiliated with Raystay. This is particularly so when viewed in conjunction with Raystay's claim that those individuals had determined what site preparation work and modifications were needed for Raystay to proceed with construction. While the phrase was perhaps literally accurate thanks to clever drafting, that is no defense. Applicants get disqualified for "statements that are 'technically' correct but misleading as to the known state of facts." RKO General, Inc. (WNAC-TV), 78 FCC 2d 1, 98 (1980). Indeed, by craftily suggesting in Exhibit 1 that the reference to Raystay covered both the representative and the engineer, while preserving a defense that it did not,

Raystay could hardly have been more devious in its intent to mislead the Commission.

271. Not only did George Gardner believe that Exhibit 1 was referring to Raystay's engineer, but he understood that the site visit referred to in Exhibit 1 had occurred before Raystay even filed the LPTV construction permit applications in 1989. (Tr. 5261.) He therefore meant the Commission to rely in part on Raystay activities that -- unbeknown to the Commission -- occurred not in the 18-month construction period during which Raystay had to show substantial progress toward construction, but before the initial grant. That was plainly disingenuous, because the Commission judges extension applications based on "progress made during the most recent construction period." Panavideo Broadcasting, Inc., 6 FCC Rcd 5259 (¶4) (1991).

272. Glendale says it is "irrelevant" that Tom Riley was Trinity's engineer because "[w]hat is significant is that David Gardner had the benefit of Mr. Riley's evaluation which could be used by Raystay." (Glendale PFCL I, p. 375, n. 27.) That, too, is utterly disingenuous, since Riley had told David Gardner that excessive dust rendered the Lancaster site unsatisfactory (Tr. 4752-53). Of course, Raystay never mentioned that fact in the Lancaster extension applications. Instead, Exhibit 1 implied that the engineer had made decisions about "site preparation work and modifications" to be undertaken by Raystay (TBF Ex. 245, p. 3). Moreover, David Gardner expressly disclaimed any

reliance on engineer Riley's views, which he said gave him no reason to deem the Lancaster site unsuitable "for Raystay's purposes." (TBF Ex. 246, p. 2, emphasis added.)[45/] Since Riley never advised Raystay about site preparation work and modifications because he thought the site was unsatisfactory, and since David Gardner admitted that he never relied on Riley's views, Glendale's rationalization that Raystay "had the benefit of Mr. Riley's evaluation" when it filed to extend the permits is a complete fabrication.

c. "Continuing Negotiations" with CATV Systems

273. In trying to justify the claim in Exhibit 1 that negotiations with local cable operators were "continuing," Glendale fails to overcome the unequivocal testimony of Raystay's own Harold Etsell, the man George Gardner assigned to develop the LPTV business plan. Etsell did have discussions with cable operators until early 1991, after which he was reassigned by George Gardner and had no involvement whatsoever with the LPTV project. (TBF Ex. 265, pp. 63, 65-66.)

274. Glendale asserts that Etsell in his testimony "left open the possibility that he had some discussions after that time." (Glendale PFCL I ¶655.) However, that claim grossly mischaracterizes what Etsell said. Etsell testified that if he

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45/ Taken literally, that statement is entirely plausible, since the record shows that Raystay's purpose by the fall of 1991 was to offload the construction permits if it could.

had any conversation with a cable operator on the subject after the first quarter of 1991 -- and he recalls none -- it would have been nothing more than a brief incidental contact at a cable association meeting where a cable operator "may have inquired of me," at which point "I would have referred them to Lee Sandifer." (TBF Ex. 265, p. 97; see also p. 108.) From this it is absolutely clear that after early 1991 Etsell was passive, uninvolved, and no longer negotiating with cable operators. As for Sandifer, Glendale makes no claim that he ever had a discussion with a cable operator.[46/]

275. Glendale relies on testimony from George Gardner and David Gardner that they recall having had occasional discussions with cable operators. (Glendale PFCL I ¶¶388-89, 395, 654.) However, that hearing-room testimony is thoroughly untrustworthy, because the sudden professed recollections of the two Gardners on the witness stand are inconsistent with their previous deposition and/or written direct testimony on the point. See TBF PFCL ¶¶360-61. Moreover, the random discussions they claim belatedly to remember could not remotely be characterized as "continuing negotiations."

46/ Also not credible is George Gardner's claimed belief that he reassigned Etsell to the LPTV project later in 1991. (Glendale PFCL I, ¶¶390, 655.) Clearly he did not, because Etsell (who would obviously know) was unequivocal on the point. Glendale elicited no testimony from Etsell that would support Gardner's claim. Moreover, the record establishes that Raystay's efforts by that time were directed solely toward minimizing its costs and selling rather than constructing its five LPTV permits.

276. Ultimately, Glendale is reduced to arguing that David Gardner believed Raystay's earlier discussions with cable operators "were still open because Raystay could still find a program service attractive to the cable operators." (Glendale PFCL I ¶395.) A more far-fetched rationalization would be hard to imagine. In essence, Glendale is saying that Raystay was in "continuing negotiations" with cable operators because Raystay hoped it might someday find the right programming. But hope does not constitute negotiation. Theoretical possibilities do not constitute negotiation. Negotiation constitutes negotiation. In December 1991 and July 1992, when it told the Commission it was in "continuing negotiations" with cable operators, Raystay was not negotiating anything with cable operators. It was telling tales to the Commission.

3. Other Facts Not Disclosed in Exhibit 1

277. Raystay did more than conceal the fact that it had no viable business plan and no intention of constructing without one. And it did more than mislead the Commission about non-existent "lease negotiations," dormant cable "negotiations," and an ostensible Raystay engineer. Exhibit 1 also did not disclose (a) Raystay's efforts to sell the construction permits, (b) the restrictions on LPTV construction imposed by Raystay's lender, or (c) the absence of any funds in Raystay's budget for LPTV construction. Acknowledging these omissions, Glendale argues that Raystay had no duty to disclose those facts because no

question on Form 307 called for that information. (Glendale PFCL I ¶¶661-62, 665-68.) That contention ignores the well-established requirement that applicants provide "all facts and information relevant to a matter before the FCC, whether or not such information is particularly elicited." Telephone and Data Systems, Inc., 9 FCC Rcd 938, 945 (1994) (emphasis added) (citation omitted). See also, Southern Broadcasting Company, 38 FCC 2d 461, 464 (Rev. Bd. 1972) ("The Commission is to be informed of all facts, whether requested in Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors") (emphasis in original).

278. The facts not disclosed by Raystay reflected that Raystay lacked intent to build the LPTV stations when it asked the Commission to extend the permits. Yet everything Raystay did say in Exhibit 1 was designed to convey exactly the opposite impression. Indeed, the very filing of the extension applications was an implicit representation that Raystay intended to construct. Low Power Television Service, 51 RR 2d 476, 517 (1982). Under these circumstances, it is no defense for Glendale to say that the application form did not ask specifically for the omitted information.[47/]

[47/] With respect to the Greyhound financing agreement, Glendale also argues that applicants need not report the existence of relevant agreements before they are executed. Glendale notes that the Greyhound agreement was not executed until July 31, 1992, after Raystay filed the second set of LPTV extension (continued...)

279. Likewise untenable are several of Glendale's factual assertions about the sale negotiations and the Greyhound financing agreement. Glendale says that "[t]he possibility of selling the construction permits played no role in the decision to file" the extension applications. (Glendale PFCL I ¶408.) That claim is flatly refuted by George Gardner's admission that "I was interested in preserving the construction permits in the event that [a prospective buyer] wanted those." (Tr. 5277.) That admission, and Gardner's belief that the permits enhanced the potential sale value of TV40 (Tr. 5277-78), also refute Sandifer's post hoc rationalization that the permits would not generate enough sale proceeds to justify the time and administrative costs involved. (Glendale PFCL I ¶408.) Gardner's admitted goal was to keep the permits to get more money for TV40 in a package sale.

280. Glendale states that if Raystay had intended to sell the permits in July 1992, Sandifer would have asked Greyhound to modify the financing agreement to explicitly allow such a sale to third parties. (Glendale PFCL I ¶¶408, 663.) That claim is

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47/ (...continued)
applications. (Glendale PFCL I ¶¶413, 666-67.) This contention overlooks Greyhound's preliminary commitment, which was secured by consideration and was executed as a letter agreement in August or September 1991. (Id. ¶413; Tr. 5063.) That agreement barred Raystay from funding LPTV construction or operations with Greyhound loan proceeds or revenues from Raystay's cable operations. (TBF Ex. 261, p. 2; Tr. 5060-63.) This restriction, therefore, effectively predated both sets of LPTV extension applications. In any event, Raystay's July 1992 extension applications were still pending before the Commission when the final Greyhound agreement was executed.